

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of

À La Carte and Themed Tier Programming
and Pricing Options for Programming
Distribution on Cable Television and Direct
Broadcast Satellite Systems

MB Docket No. 04-207

To: The Commission

COMMENTS OF THE WEATHER CHANNEL, INC.

THE WEATHER CHANNEL, INC.

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I. INTRODUCTION AND SUMMARY

The Weather Channel, Inc. (the "Company") owns and operates The Weather Channel® ("TWC"), the only national television network that focuses on weather information, and Weatherscan® by The Weather Channel ("Weatherscan"), a fledgling network that provides local weather information to its viewers (collectively, the "Networks"). TWC responds here to the Public Notice released by the Commission on May 25, 2004 to express its strong opposition to any federally mandated requirement that it offer the Networks *a la carte* or on a themed-tier basis.

Broad distribution is the single most important element of TWC's business. Its contracts with multichannel video programming distributors ("MVPDs") and its per-subscriber license fees are based on broad distribution. Its advertising and marketing plans are based on broad distribution. Its commitment to saving people's lives and providing severe weather alerts nationwide is based on broad distribution. Its investments in technology and programming are based on broad distribution. And

finally, the development of new, complementary services, such as interactive television, is based on broad distribution.

In an *a la carte* world, the Company's revenues from MVPDs and advertisers (which constitute close to 99% of its total revenues) could decrease, possibly dramatically. At the same time, expenses would increase significantly. With revenues reduced and faced with additional expenses, the Company would be forced to charge significantly more for TWC and would be unable to invest at its current rate in the quality of TWC's programming and related services.

Moreover, Weatherscan, a relatively new network with approximately seven million subscribers, would not be viable if offered on an *a la carte* basis. Weatherscan today depends entirely upon per-subscriber license fees. With carriage primarily on digital tiers, Weatherscan's audience reach already is limited, and it does not have a sufficient number of subscribers to be able independently to generate revenue from advertising sales. As a little-known start-up at this point, survival could become difficult if dependent on individual *a la carte* selection by the consumer.

II. BROAD DISTRIBUTION IS THE SINGLE MOST IMPORTANT ELEMENT OF TWC'S BUSINESS

A. Broad Distribution of TWC is the Foundation for its Low Subscriber Fees.

TWC is broadly distributed, reaching over 87 million MVPD subscribers, with a penetration level of 95% of MVPD households.¹ Because of this broad distribution, TWC is able to offer per-subscriber fees that are well below the average rate for national

¹ Nielsen Media Research, July 2004.

ad-supported network affiliation fees.² When TWC began distribution in 1982, it did not charge per-subscriber fees to MVPDs. Attempting to rely solely on advertising revenue, it came within hours of shutting down. Concerned about the potential loss of a network which they found valuable, MVPDs agreed to pay TWC per-subscriber fees. Based on its belief in and diligent pursuit of a business model based on broad distribution, TWC set low per-subscriber fees with minimal annual increases.

TWC's relationship with MVPDs continues today to be based on TWC being broadly distributed. For example, provisions in the contracts between TWC and its MVPDs may require distribution in the most widely distributed package or in a package with a certain number of other networks. An MVPD may agree to pay per-subscriber fees to TWC for a certain percentage of its subscribers notwithstanding that the MVPD may distribute TWC to a lesser number, or may agree to pay a higher per-subscriber fee if TWC is not fully distributed. The MVPD may also lose the benefit of other provisions in the contract if TWC is not broadly distributed. Whatever the provisions, the intent of the parties over the last twenty years has been clear – that TWC would be broadly distributed, thereby allowing TWC to maintain a low average per-subscriber fee.

TWC's broad distribution is in stark contrast to the distribution of the existing *a la carte* networks. The penetration levels of existing *a la carte* services are extremely low. HBO – the powerhouse of *a la carte* networks – has penetration of only approximately 30% of basic cable subscriptions.³ The penetration rates of other *a la carte* services are

² The average monthly affiliation fee per subscriber for 79 multi-channel networks from 1999-2002, as reported by GAO, was approximately \$.14 per subscriber. GAO Report No. 04-08, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, 23 (Oct. 2003) (“GAO Report”). According to Kagan, TWC's 2002 average monthly affiliation fee per subscriber was \$.09. Kagan World Media, *Economics of Basic Cable Networks 2004* 60 (10th ed. 2003).

³ Bear Stearns Equity Research, “*A La Smart*” Mar. 29, 2004 at 4 (“*Bear Stearns*”).

below, and some are substantially below, this level.⁴ These low penetration rates explain, in large part, why the services are so expensive to consumers. With limited exceptions, the costs to consumers of national *a la carte* channels range from \$10 to \$15 per channel per month.⁵ As NCTA indicates in its White Paper, Disney Channel was previously offered on an *a la carte* basis for about \$8-13 per month. When it was folded into the expanded basic tier, the price decreased to about \$1-2 per month.⁶

If TWC, a highly-specialized niche network, were offered *a la carte*, the penetration level it might achieve is unclear. However, approximately 33% of TWC's programming is viewed as a result of channel surfers landing on TWC.⁷ It is questionable whether viewers watching TWC as a result of channel surfing would purchase TWC on an *a la carte* basis. Indeed, research shows that 21% of cable television viewers are not willing to pay a separate fee at all for a network; 20% are willing to pay a fee of less than \$.50 per month; 11% are willing to pay a fee of \$.50-\$.99 per month; and fewer than half of cable television viewers are willing to pay a fee of \$1.00 or more per month for a network.⁸ Results indicate that many viewers simply do not wish to pay extra for a network even if that network is important to them and even if it contributes to their enjoyment of cable.

⁴ *Id.*

⁵ *The Pitfalls of A La Carte: Fewer Choices, Less Diversity, Higher Prices*, NCTA Policy Paper May 2004 at 12. In reality, most subscribers do not purchase the services as stand-alone services, but opt instead to purchase bundles of premium services so that they can receive lower per-channel prices afforded by the bundle. Even then, the per channel average cost of these premium channels is substantially more than the per channel cost of the channels located on the broadly penetrated tiers.

⁶ *The Pitfalls of A La Carte: Fewer Choices, Less Diversity, Higher Prices*, NCTA Policy Paper, May 2004 at 11-12.

⁷ Westgate Research/TWC Quarterly Tracking Survey, 1Q-4Q 2003.

⁸ Beta Research Corporation, 2003 Beta Cable Subscriber Study (Aug. 18 – Sept. 13, 2003) (“Beta Cable Subscriber Study”).

The unwillingness of viewers to pay separately even for networks that they may consider important is precisely the scenario that is transpiring for The Weather Network in Canada, where one MVPD (Star Choice) is fighting to shift the Weather Network from its basic tier to a package called "Our Life."⁹ If the shift occurs, The Weather Network will experience an astounding 75% reduction in The Weather Network's subscribers (the penetration of the Our Life tier is 25% that of the basic tier).¹⁰ The Weather Network would also experience a corresponding 75% reduction in per-subscriber fees from Star Choice absent The Weather Network's successful negotiation of a significant increase in per-subscriber fees.

If TWC is offered *a la carte* or on a themed-tier basis, TWC would be forced to increase its per-subscriber fees to make up for the inevitable reduction in penetration. If TWC were to lose 50% of its subscribers, TWC would need to make up more than \$40 million in per-subscriber fees to maintain its current subscription revenue levels.¹¹ (This revenue shortfall does not take into account the loss of advertising dollars, which could easily exceed the per-subscriber fees lost at this reduced level of penetration.) The brunt of this price increase would be borne by the consumers. Although it remains uncertain as to what an *a la carte* rate might be for TWC, when TWC explored the possibility of *a la carte* with an MVPD several years ago, the result was an under-30% penetration rate, which was more than ten times the standard rate with full penetration. Clearly, broad distribution of TWC is the foundation for its low per-subscriber fees.

⁹ TWC's parent company, Landmark Communications, Inc., owns a 50% interest in Pelmorex Communications, Inc., the parent company of The Weather Network.

¹⁰ 30 Decima's Canadian Communications Reports, Issue No. 12 (June 21, 2004).

¹¹ This calculation is based on Kagan's 2004 average monthly affiliation fee per subscriber for TWC of \$.09. Kagan World Media, *Economics of Basic Cable Networks* 2004 60 (10th ed. 2003).

B. TWC's Advertising Revenues are Dependent on Broad Distribution.

As a network with 95% penetration, TWC generates the majority of its revenue from advertising sales,¹² thus further enabling TWC to keep its per-subscriber fees low. Its broad penetration attracts national advertisers and makes it a viable platform to achieve significant audience reach, a key component in successful advertising sales. Along with per-subscriber fees, advertising revenue is essential to TWC's ability to produce its quality service and to offer the low per-subscriber fees that make its service affordable to consumers.

Audience size is the currency of advertising media. "[A]dvertisers will pay more to place an advertisement on a network that will be viewed, or [has] the potential to be viewed, by the greatest number of people."¹³ Even though TWC's total daily household television ratings are a fraction of, for example, any of the television ratings of the top seven broadcast networks, TWC is able to compete effectively in the marketplace for advertising dollars due to its broad cumulative audience reach – a direct byproduct of broad distribution. Absent broad distribution by TWC, many of its advertisers might opt instead to spend money on fully-penetrated broadcast networks, the top seven of which already command 71% of the prime-time ad dollars.¹⁴ Not having the must-carry benefits that virtually guarantee full distribution of the broadcast networks, TWC could in fact experience a loss in penetration if offered *a la carte* or on a themed-tier basis, and could experience a corresponding decrease, perhaps significant, in advertising revenue. The

¹² According to Kagan, 55.1% of TWC's revenue came from advertising sales in 2003. *Id.* at 452.

¹³ GAO Report at 35.

¹⁴ *Closing The Ad Gap*, CABLE FAX DATA BRIEFS, Mar. 29, 2004. See also "FCC Releases 12 Studies on Current Media Marketplace", MB Docket No. 02-277, MM Docket Nos. 01-233, 01-317, 00-244, FCC LEXIS 4932, Part 7 at *53-54 (Oct. 1, 2002) (recognizing advantage that major broadcast networks already have over niche cable networks).

cost of making up the lost advertising revenue would have a direct impact on what the consumer pays for TWC.

C. An A La Carte Regime Would Exponentially Increase TWC's Marketing Expenses.

In an *a la carte* world, TWC would necessarily incur a significant increase in marketing expenses. As an established network with broad distribution, TWC devotes only a small portion of its budget toward marketing its services, and TWC markets those services primarily to its direct customers—MVPDs and advertisers.

As an *a la carte* channel, TWC would be forced to focus its marketing efforts not only on MVPDs and advertisers but also to spend significant dollars on marketing TWC to the more than one hundred million television households that might want to purchase its service *a la carte*. As an independent, non-vertically integrated network, TWC does not have available to it local ad avails across all networks and unsold inventory or cross-promotion time heavily discounted on affiliated networks. TWC would have to pay market prices to purchase advertising time on non-TWC networks. TWC would also have to spend significant dollars on other media in order to reach the consumer base that would be necessary to market TWC effectively. Such expense would be incurred not only upon the inception of *a la carte* but on a going-forward basis, as there has been frequent subscriber turnover for existing *a la carte* networks. TWC also would necessarily incur the costs of expensive and labor intensive research to determine which consumers would be most likely to select TWC, and the amount the consumer would pay for TWC.

There may be an assumption, given TWC's broad penetration and TWC's formidable reputation as a reliable provider of critical weather information, that most consumers would opt to pay for TWC even *a la carte* and even absent the level of consumer marketing of the nature in which current *a la carte* networks engage. This assumption simply does not play out. While almost 60% of households that receive TWC watch TWC at least monthly, only 11,082,000 do so at least daily, with the remainder watching on a more episodic basis.¹⁵ As previously mentioned, approximately 33% of the viewing of TWC's programming is derived from channel surfers. Notwithstanding their recognition of TWC's value, many of these occasional viewers likely would not select TWC when faced with a menu of channel choices and limited dollars to spend on programming. Accordingly, in an *a la carte* world, TWC would have to increase significantly its expenses for marketing. This necessary shift in resource allocation could impact TWC's ability to invest in new programming initiatives and advanced technology, and in turn, negatively impact the viewers who have come to rely on and enjoy TWC over the last 20 years.

D. Broad Distribution of TWC Supports Its Investment in Technology and Quality Programming.

TWC continuously invests in the development of new and improved advanced technology, including state-of-the-art equipment to provide local weather information and life-saving alerts on a national scale, interactive services, and similar initiatives. TWC also continues to invest in its programming, such as the award-winning show "*Storm Stories*." Lower distribution would provide a significant disincentive for TWC to invest

¹⁵ Nielsen Media Research (N-Power), TWC Consumer and Strategic Research, Jan. – Dec. 2003, Reach % Based on 3 Min. Qualifier, 6a-6a (2003).

at its current level in advanced technology and original, high-quality programming, as the benefits of furthering these initiatives to a smaller viewer pool would be far outweighed by the costs.

For example, over the years TWC has provided MVPDs with “Weather Stars®,” a system of more than 9,000 automated graphic and/or text computers located at cable headends that enable TWC to deliver thousands of local forecasts simultaneously (such local weather forecasts are known as “Local on the 8s®”). TWC’s system, which is fully automated, also downloads emergency weather bulletins from the National Weather Service and other government agencies, and displays the bulletins to the relevant geographic audiences. Over the course of its operating history, TWC has proactively developed and deployed several new generations of Weather Star technology at significant capital expense, and has recently introduced the latest Weather Star equipment called the IntelliStar®. Among other improvements, the IntelliStar equipment, which is designed to operate in the emerging digital environment, provides more contextually relevant weather information to consumers. For instance, during periods of severe weather, the IntelliStar will provide longer and more targeted radar to track severe weather more effectively. It will also support alternative network feeds that will allow for continued coverage of severe weather events for impacted areas, without affecting normal programming in other areas. In order to recoup the significant cost of this equipment over time, TWC offers the equipment without charge only to systems that have 6,500 or more subscribers. Absent this level of subscriber reach, it would not be cost effective for TWC to pursue improved upgrades of this nature, which upgrades greatly benefit consumers.

E. Without the Essentially Ubiquitous Availability of TWC, TWC Could Not Sustain Its Role As a Provider of Public Safety Information.

TWC provides up-to-the-minute information about weather and the environment to in excess of 87 million households in the United States. TWC's timely alerts and warnings have substantial value to cable television viewers as well as emergency management groups seeking to distribute critical information.¹⁶ Seventy-two percent of the U.S. population obtains its weather information from television as opposed to other sources (e.g. radio).¹⁷ In U.S. households located in remote, non-urban areas, TWC may be the only viable television source to notify viewers of impending and potentially life threatening severe weather events. In these areas, the nearest local broadcast station can be hundreds of miles away and thus cannot provide weather alerts and warnings that are as locally relevant as those provided by TWC, which has invested millions of dollars in technology that allows for the provision of weather information on a highly-localized basis (as targeted as by zip code).¹⁸ As a result, TWC plays a valuable and critical role in the dissemination of this potentially life-saving information to the public.¹⁹

TWC's importance in disseminating critical information to the public is recognized by government agencies as well. TWC has received annual grants from

¹⁶ Satellite subscribers currently do not receive these localized warnings, as satellite distributors' infrastructures differ from that of cable distributors.

¹⁷ TWC Quarterly Tracking Survey 1Q 2003 – 1Q 2004.

¹⁸ Indeed, to support their waiver requests, many small cable systems that were granted temporary waivers of the FCC's Emergency Alert System requirements relied in part upon the fact that they carried TWC. *See, e.g., In the Matter of Tel-Star Cablevision, Inc., Request for Waiver of Section 11.11(a) of the Commission's Rules, File No. EB-02-TS-478, Order, 17 F.C.C.R. 21477 (Enforcement Bureau 2002).*

¹⁹ Television ratings spike significantly during severe weather events (e.g., during Hurricane Floyd in 1999, TWC's daily viewership levels reached 45 million people as opposed to the usual range of 10-15 million people). *See, e.g., Nielsen Media Research (N-Power), Persons 2+ Total Daytime Audience (Sept. 1999).*

federal government agencies to produce programming that emphasized the agencies' messages on matters of public importance. In 2003 and 2004, TWC received grants from EPA and NOAA, among others, to produce programming segments promoting important government objectives on issues such as global warming. TWC's ability to aid these government agencies in their efforts to communicate important information to the nation's television viewers would be thwarted in an *a la carte* world.²⁰ Federal and state emergency management agencies also have recognized the tremendous services provided by TWC.²¹ Without broad distribution, TWC simply could not continue to provide the same value to emergency management agencies, or to the public, that it does today, and has for over 20 years.

F. Weatherscan, a Recently Launched, Highly Localized Service, Is Unlikely to Thrive if Limited by Forced A La Carte or Themed-Tier Subscription.

In the words of TWC's founder, Frank Batten Sr., the announcement of The Weather Channel's launch in 1982 to a room filled with journalists was met with "...silence. Then a collective groan from the audience. As the subsequent questions made painfully clear, almost everyone in the room thought The Weather Channel was a nonstarter, a waste of a precious transponder."²² Twenty years later, TWC ranks as one of the most powerful and trusted media brands in the country, ranking ahead of CNN,

²⁰ A critical requirement for the grants included the network's availability to "a national audience" and the fact that it reaches over "95% of multichannel television homes nationwide." (Excerpts from Statements of Work provided to government agencies).

²¹ For example, the Federal Emergency Management Agency recognized TWC for hurricane preparedness and public notification of weather related hazards; the National Oceanic & Atmospheric Administration lauded TWC for significant services rendered to the National Weather Service; and Radio Emergency Associated Communications Team International acknowledged TWC for timely early warning program for severe weather. In addition, TWC received Governors' Conference awards from the state of Florida in 1998, and from the state of Georgia in 1994, for its "outstanding" and "unsurpassed" support of the states' hurricane preparedness programs.

²² Frank Batten, "Out of The Blue and Into The Black," Harvard Business Review 112 (April 2002).

Headline News and MSN on weekend mornings, with the second largest audience share among adults 25-54 in weekday and weekend morning news programming.²³ But at its launch, no one thought it would survive. Given the skepticism of the public about the need for a service such as TWC, it is doubtful that the consumer would have chosen it in an *a la carte* world.

The Company's latest offering, Weatherscan, is a 24-hour, all-graphic digital network offering customized local weather information to MVPDs serving primarily the top 50 DMAs. Weatherscan provides information on local conditions, observations for surrounding communities, local and regional radar, satellite images, 36-hour and extended forecasts, and weather watches and warnings. In addition, MVPDs have the option of further customizing Weatherscan to the local community through insertion of tailored lifestyle information relating to weather as it impacts local sporting events, outdoor activities and other subjects of interest, such as golf, skiing, boating, beach conditions, health and aviation.

Weatherscan's viewers have expressed extreme satisfaction with its programming and find it important to their enjoyment of cable television.²⁴ Weatherscan ranked as the most important network among its digital cable viewers, *i.e.*, first among 37 digital basic networks in terms of the percentage of viewers who feel the network is important to the enjoyment of cable, and also had the highest satisfaction rating among viewers in the same study.²⁵

²³Nielsen Media Research (N-Power), 3/1/04-3/28/04, Sa-Su 11 a.m. (March 2004), Nielsen Media Research 2/24/03-3/03/03, Sa-Su 11 a.m. (March 2003), Nielsen Media Research, 12/29/03-3/28/04 (Q1 2004).

²⁴Beta Cable Subscriber Study.

²⁵*Id.*

Notwithstanding this level of appreciation in a modest number of households, Weatherscan is unlikely to thrive if its growth is limited by forced *a la carte* subscription. Potential subscribers are not familiar with it - indeed most have probably never heard of it - and as a start-up with low penetration it does not have the reach to appeal to advertisers. A federal mandate requiring Weatherscan to be offered *a la carte* or as part of a themed-tier would virtually ensure its demise.

III. CONCLUSION

For over 20 years, the Company has built a business based on broad distribution of TWC to the consumer. It is now attempting to build another network, Weatherscan. The requirement that the Company's Networks be offered *a la carte* or on a themed-tier basis would be not only adverse to the Company's businesses, but also to the Networks' viewers, the consumers.

The Weather Channel, Inc. respectfully submits that the Commission should conclude, and should report to Congress, that the case cannot be made for adoption of an *a la carte* or a themed-tier requirement, and that government imposition of such a regime is unwarranted, unwise and legally indefensible.

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July 15, 2004

CERTIFICATE OF SERVICE

I, Debra Holland, Secretary of Cole, Raywid & Braverman, L.L.P., do hereby certify that on this 15th day of July, 2004, true and correct copies of Comments of The Weather Channel, Inc. have been sent as follows:

1. By electronic filing with the Federal Communications Commission via the internet at <http://www.fcc.gov/e-file/ecfs.html>.

2. By messenger on the 16th day of July, 2004 to the following:

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